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In the Supreme Court of the United States

OCTOBER TERM, 1989

ALTHEUS RICHARDSON, ET AL., PETITIONERS

v.

UNITED STEEL WORKERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state law claim alleging a breach of the duty owed by a union to the employees it represents as their exclusive bargaining agent is completely preempted by federal law.

2. Whether that claim is removable from state court to federal district court.

3. Whether the court of appeals erred in upholding the denial of intervention to certain fellow employees of the original plaintiffs.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are 55 former employees of Phelps Dodge Refinery in El Paso, Texas. They were permanently replaced by their employer during the course of an economic strike. They filed suit in state court against the respondent Union, alleging (Pet. App. 2-3):

> Between July 1, 1983, and April 5, 1985, Defendant acted as bargaining agent for Plaintiffs in connection with their employment by the Phelps Dodge Refinery in El Paso, Texas. As the bargaining agent for Plaintiffs, Defendant had a duty to advise them of measures which their employer could, and in reasonable probability would, take, should members of the bar-

> gaining unit (including Plaintiffs and others) either vote to reject their employer's final offer or vote to go out on strike. Among the employer's rights in this dispute was the right to put into effect its final offer after bargaining to impasse, and to hire permanent replacements in the event of a strike. Defendant, without legal justification or excuse, failed to advise plaintiffs that their employer had these rights. Thereafter, the employer exercised these rights, and all Plaintiffs were permanently replaced by the employer. Had Plaintiffs known that their employer had the rights which it in fact had, they would have either persuaded the other members of the bargaining unit to vote in favor of the employer's final offer, and if that had failed, then Plaintiffs would have accepted the final offer individually.

The Union removed the case to the United States District Court for the Western District of Texas pursuant to 28 U.S.C. 1441.[1] Asserting that petitioners' action was based on the allegation of a breach of the federal duty of fair representation, the Union then moved to dismiss the claim as time barred under the six-month limitations period applicable to such claims under *DelCostello* v. *Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983). Pet. App. 3-4.

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[1] Section 1441 (28 U.S.C.) provides in pertinent part:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

As the Union has not sought to base removal on diversity of citizenship, only federal question removal is at issue. See Pet. App. 11.

Petitioners, in turn, moved to remand the case to the state court on the ground that their action was a claim for negligent breach by the Union of a Texas common-law tort duty and that the state statute of limitations applied. The court then granted the Union leave to amend its removal petition to allege federal jurisdiction based on Section 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. 159(a), and 28 U.S.C. 1331 and 1337. Pet. App. 4.

The district court denied petitioners' motion to remand, applied the six-month federal limitations period, dismissed the claim as time-barred, and denied the motions to intervene of 14 similarly situated employees. Pet. App. 4-5.

2. The court of appeals affirmed the district court's judgment. Pet. App. 1-19. In determining whether petitioners' action arose under state or federal law, the court noted that the original petition had described the "duty which the Union allegedly breached" as one belonging to the Union by virtue of its role "*[a]s* the bargaining agent for Plaintiffs (emphasis added)." *Id.* at 6. It "is well established," the court stated (*id.* at 7), that "a union's conduct vis-a-vis the bargaining unit members when the union is representing them" is governed by a "duty of fair representation" grounded in federal labor law. Citing *Vaca* v. *Sipes*, 386 U.S. 171 (1967), the court held that the federal duty of fair representation preempts state substantive law and that, while state courts have concurrent jurisdiction to entertain suits alleging a breach of that duty, federal substantive law applies in determining whether the duty was breached. Pet. App. 8-9. The court further noted that petitioners "did not allege any breach of a state tort duty that exists independently of the NLRA-established collective bargaining relationship, which is the central concern of the NLRA." *Id.* at 10.[2]

[2] The court observed that, like *Int'l Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851 (1987), this case did not present the question

Turning to the removal issue, the court stated that "federal preemption is generally a defensive issue that does not authorize removal of a case to federal court." Pet. App. 13. However, the court further observed that in *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968), the Supreme Court held that state law claims alleging breach of a collective bargaining agreement were removable to federal court because they "were so wholly preempted" by Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185. Pet. App. 13-14. The court concluded (*id.* at 16):

> [W]here the NLRA federal law duty of fair representation, actionable in federal court, preempts a state law claim, the suit asserting such a claim arises under Section 1337 and may be removed to federal court just as the suit asserting state law claims preempted by section 301 of the NLRA may be removed under *Avco* and its progeny. *Avco* recognized removal based on Section 301's complete, displacing preemption of state law because of congressional intent that federal (and state) courts create and administer a comprehensive body of federal law for the court enforcement of collective bargaining agreements. Under *Vaca*, the NLRA duty of fair representation, for the enforcement of which a federal (and state) court action is authorized, completely preempts state law because of the congres-

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whether "the Union was subject to 'an independent state-law duty of care . . . arising simply from the relationship of a union to its members.' " Pet. App. 10 (quoting 481 U.S. at 864 n.5). Petitioners did not allege a duty arising from the membership relationship -- indeed the original petition did not even allege "that plaintiffs are or were members of the Union." Pet. App. 10. Rather, petitioners based their action on the allegation of "a duty arising from the collective bargaining agent's relationship under the NLRA with the bargaining unit members, who may or may not be union members." *Ibid.*

> sional intent that federal law, developed to further the goals of the NLRA, entirely govern the duties which an NLRA collective bargaining representative owes, by virtue of its position as such, to the workers it represents in that capacity.

Citing *DelCostello* v. *Int'l Bhd. of Teamsters*, *supra*, the court agreed that petitioners' duty of fair representation suit, "which [was] filed approximately two years after their claims arose, [was] * * * time-barred" under the applicable six-month limitations period. Pet. App. 10-11. The court further held that the district court did not err in denying intervention to the employees who sought to join the action. *Id.* at 17-18.

DISCUSSION

Petitioners' principal contention is that the court of appeals erred in holding that their state law claim – a claim based on breach of a duty owed by the Union as their exclusive bargaining agent – is completely preempted by a federal cause of action. Pet. 5-10. Petitioners also contend that the case was improperly removed to federal district court. However, petitioners concede (Pet. 9) that, if the state claim is completely preempted, removal is proper. Petitioners' contentions raise no issue warranting review by this Court.[3]

1. In *Vaca* v. *Sipes*, 386 U.S. at 177, the Court held that federal law governs a cause of action for breach of the

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[3] Petitioners' final contention (Pet. 11) – that the district court erred in denying intervention because "extraordinary circumstances" were present that justified permissive intervention – presents a factual issue that does not merit this Court's attention. In any event, as the court of appeals noted (Pet. App. 18 n.9), if intervention were granted, the claims of the intervenors would have been dismissed along with those of the original plaintiffs.

duty of fair representation because the "duty is grounded in federal statutes." Accordingly, the Court reversed a judgment of the state court finding that the union had violated state law in refusing to take to arbitration an employee's claim of wrongful discharge found by a state court jury to be meritorious. The Court held that, under federal law, the employee must "prove[ ] arbitrary or bad-faith conduct on the part of the Union in processing his grievance," not merely that the grievance had merit. The Court stated (386 U.S. at 192-193):

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. [4]

Here, petitioners allege a violation of a duty that is established by federal labor law: the obligation of the union as exclusive representative of employees in a bargaining unit fairly to represent all the employees in that unit. Petitioners have identified no independent source in state law of a duty owed by a union in its role as exclusive bargaining representative under the NLRA to the employees in their role as

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[4] As the Court further explained in *Amalgamated Ass'n of Street Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971), "[p]re-emption * * * is designed to shield the system from conflicting regulation of conduct." Therefore, causes of action that "define[ ] differently what sorts of * * * union conduct may permissibly be proscribed" do not survive preemption simply because they can be styled as state law claims in contract or tort rather than as claims of violations of federal standards governing labor relations.

members of the bargaining unit, nor could they do so.[5] Indeed, it is only because the union is empowered under Section 9(a) of the NLRA, 29 U.S.C. 159(a), to act as the exclusive representative of all employees in the bargaining unit that the union owes a corresponding duty to represent each member of the unit fairly.

Petitioners argue (Pet. 5-6) that preemption is unwarranted here because to preclude a state cause of action when a union gives "careless" advice in the course of representing employees would "place labor unions beyond the reach [of the] accountability for their actions" that lawyers have in giving advice to clients, and would "effectively exempt[ ]

[5] In *United Steelworkers* v. *Rawson*, 770 P.2d 794, 796 (Idaho 1989), petition for cert. pending, No. 89-322, the court held that where a union "did actively undertake" a duty to conduct safety inspections of the workplace, that duty is governed by standards imposed under state tort law, and the union could be held liable for workplace injuries allegedly caused by its negligent inspections. *Id.* at 796-797.

The Idaho Supreme Court stated that it was not necessary to "look[ ] at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded the union undertook to inspect." 770 P.2d at 796. And, contrary to the implication in the respondent's brief in opposition in this case (Br. in Opp. 2 n.1), the court nowhere stated in *Rawson* that the statutory duty of fair representation was the source of the union's duty to conduct safety inspections; rather, the court found that the union had voluntarily "undertaken" this duty. The court thus held that the plaintiffs had claimed a breach of a state duty of care that was independent of the bargaining representative/bargaining unit relationship as well as of the collective bargaining agreement, and that the issue before the court was "solely whether that inspection was negligently performed under traditional Idaho tort law." 770 P.2d at 796. The correctness of that finding is immaterial to the disposition of the instant case, where the court found that the character of the duty at issue was wholly dependent on the relationships established under federal labor law and that no independent state duty had been asserted. We therefore agree with respondent (Br. in Opp. 2 n.1) that *Rawson* does not create a conflict with the decision below.

Labor Unions from any of the legal consequences normally associated with negligence in all of the States." *Id.* at 8-9. But the purpose of preemption is precisely to preclude the State from impairing the ability of the bargaining agent properly to perform its function by imposing a higher standard of care on a union representative than that imposed under the federal labor law that defines the union's duty. As the court below explained in summarizing *Vaca*, "this uniform federal standard [of fair representation] struck the proper balance between the union's need for discretion when acting as the representative of all the bargaining unit members and the individual's right to be treated fairly." Pet. App. 8. And, as the court of appeals also noted (*id.* at 10), petitioners do not claim that the union breached any state duty of care independent of the relationship of bargaining representative to employees (such as a state law duty that might arise between any organization and its members).[6]

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[6] The court of appeals acknowledged (Pet. App. 10) that there are exceptions to the general preemption rule, such as where an independent state law duty of care regulates activity " 'deeply rooted in local feeling' " or of " 'peripheral concern of the NLRA,' " citing, *inter alia*, *Farmer* v. *Carpenters*, 430 U.S. 290 (1977). In *Farmer*, the Court held that a claim of intentional infliction of emotional distress is actionable under state tort law even though the conduct at issue grew out of alleged discrimination in union administration of a hiring hall, because the state had a substantial interest in protecting its citizens from such "outrageous" conduct and could do so without "resolution of the 'merits' of the underlying labor dispute" (*id.* at 304). However, the Court cautioned that "[u]nion discrimination in employment opportunities cannot itself form the underlying 'outrageous' conduct on which the state-court tort action is based. * * * [I]t is essential that the state tort be either unrelated to employment discrimination,"—which is a matter regulated by federal labor law—"or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself" (*id.* at 305). Moreover, in *Farmer*, the duty to refrain from inflicting emotional distress did not depend on the character of the

Petitioners further contend (Pet. 6-7) that preemption is not appropriate here because a state cause of action would not disrupt labor management relations or require analysis or interpretation of a collective bargaining agreement. Implicit in this contention is the assumption that the preemptive effect of the federal duty of fair representation is limited to matters arising under a collective agreement. But that assumption is incorrect. It is settled that a union may breach its duty of fair representation in ways unrelated to administration of a collective bargaining agreement,[7] and there is no valid reason why the duty fairly to represent employees as delimited by federal law should be any less exclusive in such a case than in a case arising in connection with a collective agreement. The question in both instances involves the "proper balance between the union's need for discretion * * * and the individual's right to be treated fairly." Pet. App. 8. Moreover, insofar as petitioners rely on the decisions of this Court[8] and the courts of appeals[9] holding

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relationship between the employees and the union *as their exclusive bargaining representative*, and thus was not wholly a creature of the federal labor law that creates and governs this relationship.

[7] See, *e.g.*, *Lewis* v. *Local Union No. 100 of the Laborers' Int'l Union*, 750 F.2d 1368, 1376 (7th Cir. 1984); *Storey* v. *Local 327, Int'l Bhd. of Teamsters*, 759 F.2d 517, 523 (6th Cir. 1985); *Beriault* v. *Local 40, Super Cargoes & Checkers*, 501 F.2d 258, 264-266 (9th Cir. 1974). See also *Breininger* v. *Sheet Metal Workers*, No. 88-124, (Dec. 5, 1989), slip op. 11-15.

[8] See *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Int'l Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851 (1987); cf. *Lingle* v. *Norge Division of Magic Chef*, 108 S. Ct. 1877 (1988).

[9] The three court of appeals cases cited by petitioners (Pet. 7) all involve situations where the court, relying on *Lingle*, *supra*, held that an independent state cause of action was not preempted simply because the conduct might also have created a breach of the collective agreement. *Ackerman* v. *Western Elec. Co.*, 860 F.2d 1514 (9th Cir. 1988) (handicap discrimination under state fair employment law); *Krasinski*

that federal law preempts state law claims that require analysis or interpretation of a collective bargaining agreement—but not those where resolution of the state claim is independent of the contract—that reliance is misplaced. As respondents point out in their brief in opposition (at 12 n.12), "[t]he controlling question here is not the preemptive scope of § 301 [of the LMRA], as in *Allis-Chalmers* and *Hechler*, but rather the preemptive reach of the duty of fair representation, which exists independent of § 301." Since Section 301 only encompasses suits to enforce collective bargaining agreements, the preemptive effect of that provision on a state law claim naturally turns on the relation of the claim to the collective bargaining agreement. A duty of fair representation claim, like the one asserted here, may be unrelated to any right under a collective agreement; there is thus no warrant for making the preemptive effect of such a claim turn on whether it requires analysis or interpretation of the agreement.

2. As the court of appeals acknowledged (Pet. App. 13), a case is not removable to federal district court simply because, as a matter of defense, it can be shown that it is preempted by federal law. *Caterpillar* v. *Williams*, 482 U.S. 386, 393 (1987). "[T]he plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law" (*ibid.*). But, as the Court further explained in *Caterpillar*, 482 U.S. at 393 (citation and footnote omitted):

> There does exist, however, an "independent corollary" to the well-pleaded complaint rule, * * * known as the "complete preemption" doctrine. On occasion, the

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v. *United Parcel Service*, 530 N.E.2d 468 (Ill. 1988) (malicious defamation in the course of a discharge); *Merchant* v. *American S.S. Co.*, 129 L.R.R.M. 2737 (6th Cir. 1988) (retaliatory discharge for bringing personal injury action).

> Court has concluded that the preemptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Thus, in *Avco Corp.* v. *Aero Lodge No. 735*, 390 U.S. 557 (1968), the Court held that a state court suit seeking injunctive relief based on breach of a no-strike clause in a collective bargaining agreement was removable to federal district court because, under Section 301 of the LMRA, federal substantive law controlled the action even though the state court had concurrent jurisdiction to apply that law. 390 U.S. at 560. The Court considered it immaterial that the Norris-LaGuardia Act would preclude the availability of injunctive relief in federal court: "[T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.* at 561.

As the Court explained in *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983):

> The necessary ground of decision [in *Avco*] was that the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely pre-empts a state cause of action,

any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

The court of appeals correctly concluded that the *Avco* complete preemption principle is applicable here. As shown above, the only claim asserted in the complaint was that the union breached a duty owed to the employees in its capacity as their bargaining representative. But, as *Vaca* establishes, that duty is solely a creature of federal law.

To be sure, "even an 'obvious' preemption defense does not, in most cases, create removal jurisdiction;" there must be a clearly manifested congressional intent to establish a federal cause of action which could have been brought in federal court in the first instance. *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 66 (1986). But it is plain that, as employees represented by a union, petitioners have a federal cause of action against that union for breach of the duty of fair representation—a cause of action that is within original federal court jurisdiction under 28 U.S.C. 1331 and 1337. See *Breininger* v. *Sheet Metal Workers*, No. 88-124, (Dec. 5, 1989), slip op. 14 ("We have always assumed that independent federal jurisdiction exists over fair representation claims because the duty is implied from the grant of exclusive representation status and the claims therefore 'arise under' the NLRA"); see also *Lewis* v. *Local Union No. 100 of the Laborers' Int'l Union*, 750 F.2d at 1375 n.7; *Storey* v. *Local 327, Int'l Bhd. of Teamsters*, 759 F.2d at 523; *In re Carter*, 618 F.2d 1093, 1104 (5th Cir. 1980).

In sum, the court of appeals correctly concluded that petitioners' state law claim was wholly preempted by a federal cause of action and that the case was therefore properly removed to federal district court under 28 U.S.C. 1441(b). Moreover, its decision is not in conflict with decisions of this Court or those of any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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